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Marie T. Breslin
Director
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May 17, 1996

EX PARTE

Mr. William Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Re: CS Docket No. 96-46, Open Video Systems

In accordance with the Commission's ex parte rules, please include the attached written ex parte communiation as part of the public record in the above-captioned proceeding.

Please call me if you have any questions concerning this filing.

Sincerely,

Marie Breslin

Attachment

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May 17, 1996

EX PARTE

Ms. Jackie Chorney
Legal Advisor
Office of Chairman Hundt
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Re: CS Docket No. 96-46, Open Video Systems (OVS)

Dear Ms. Chorney:

Attached is a written ex parte that responds to the question you raised in the Bell Atlantic/TELE-TV meeting last Tuesday regarding application of the Commission's Program Access rules to exclusive contracts with OVS programming providers.

Please call me if you have any questions.

Sincerely,

Marie Breslin

Attachment

APPLICATION OF THE COMMISSION'S PROGRAM ACCESS RULES TO EXCLUSIVE CONTRACTS WITH OVS PROGRAMMING PROVIDERS

Sections 628(b) and 653 of the Communications Act allow the Commission to prohibit exclusive contracts between vertically integrated programmers and open video system ("OVS") programming providers. Such a prohibition is necessary to protect competition and to "encourage telephone company entry" into video distribution through OVS.[1] A per se rule would, moreover, be consistent with the Commission's decision not to forbid all exclusive contracts for DBS distribution;[2] unlike exclusive contracts with DBS operators, exclusive contracts with OVS programming providers necessarily would impede the development of a video distribution method that Congress intended to encourage.

I. The Commission Has Authority to Ban Exclusive Contracts that Limit the Development of Competition to Cable.

In enacting Section 628, Congress created a mechanism "for the Commission to regulate program access practices in a manner that would remedy (and thus eliminate) unfair and anticompetitive behavior."[3] Section 628(c) commands the Commission to establish

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[1]Report and Order and Notice of Proposed Rulemaking, Implementation of Section 302 of the Telecommunications Act of 1996, CS Dkt. No. 96-46 at ¶ 2 (FCC Mar. 11, 1996) ("NPRM").

[2]See Memorandum Opinion and Order on Reconsideration of the First Report and Order, Implementation of the Cable Television Consumer Protection and Competition Act of 1992, 10 FCC Rcd 3105 (1994) ("Reconsideration Order").

[3]First Report and Order, Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992, 8 FCC Rcd 3359, 3376 (1993) ("First Report").

regulations that, at a "minimum," proscribe specified anticompetitive practices -- including exclusive contracts between vertically integrated programmers and cable operators.[4] These mandatory rules are a floor for Commission action, not a ceiling; section 628(b) leaves the Commission broad discretion to prohibit other forms of anticompetitive conduct, "the purpose or effect of which is to hinder significantly or to prevent any multichannel video programming distributor from providing satellite cable programming or satellite broadcast programming to subscribers or consumers."[5]

Section 628(b) "is a clear repository of Commission jurisdiction to adopt additional rules or to take additional actions to accomplish statutory objectives should additional types of conduct emerge as barriers to competition . . . ."[6] In particular, section 628(b) and its implementing rule, 47 C.F.R. § 76.1001, enable the Commission to prohibit unfair practices that limit the development of new competition by inhibiting multi-channel video programming distributors ("MVPDs") from providing satellite cable programming to subscribers.[7]

On top of this general mandate, section 653 -- the OVS provision of the Telecommunications Act of 1996 -- reflects an affirmative congressional intention to "encourage common carriers

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[4] 47 U.S.C. § 548(c)(2).

[5] 47 U.S.C. § 548(b).

[6] First Report, 8 FCC Rcd at 3374.

[7] Reconsideration Order, 10 FCC Rcd at 3127.

to deploy open video systems."[8] Read in light of this new command, section 628(b) requires the Commission to act with particular firmness against practices of vertically integrated programmers that impede the development of OVS.[9] Exclusive contracts by which a programmer grants distribution rights to one or more OVS programming providers, while denying those rights to other programming providers on the same system, typify such practices.

II. Exclusive Contracts Would Impede Competition and Discourage Deployment of OVS Systems.

Under the 1996 Act, programming providers affiliated with the OVS operator may not enter into exclusive arrangements with vertically integrated programmers.[10] If other programming providers could do so, they would have a clear regulatory advantage over operator-affiliated providers, contrary to the principle of regulatory parity that the Commission has espoused under the 1992 Cable Act and in a variety of other contexts.[11]

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[8]S. Conf. Rep. No. 230, 104th Cong., 2d Sess. 178 (1996).

[9]See United States Nat'l Bank v. Independent Ins. Agents of Am., 508 U.S. 439, 454 (1993) (statutory interpretation must take account of "the provisions of the whole law, and . . . its object and policy") (internal quotation marks omitted).

[10]See § 628(j) (to be codified at 47 U.S.C. § 548(j)).

[11]See, e.g., Notice of Proposed Rulemaking, Implementation of the Cable Television Consumer Protection and Competition Act of 1992, 7 FCC Rcd 8055, 8065 (1992) (Cable Act "appears to leave the Commission flexibility to create a measure of regulatory parity among entities that are 'in the same market' and, generally, at the same distribution level with cable systems"); Implementation of Sections 3(n) and 332 of the Communications Act; Regulatory Treatment of Mobile Servs., 9 FCC Rcd 1411, 1420

There is no indication that Congress specifically intended such differential treatment of exclusive contracts. To the contrary, it would be inconsistent with statutory provisions that ensure that all OVS programming providers will compete on equal terms.[12]

The most egregious abuses would arise if cable companies were allowed to obtain OVS capacity in markets they already serve. In that case, cable operators could accomplish through their affiliated OVS programming providers exactly what section 628(c) forbids them from doing through their cable systems -- enter into exclusive distribution arrangements that deny critical programming to new entrants.

A similar problem would arise if out-of-region cable operators could obtain OVS capacity. For example, four different cable MSOs (TCI, Time Warner, Comcast, and Continental) have an ownership interest in CNN. To protect these MSOs' cable monopolies against LEC entry, CNN could simply give exclusive OVS distribution rights to one of its owners in every market where

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(1994) (similar regulation of entities providing similar services promotes competition and innovation, as opposed to "strategies in the regulatory arena"); Petition of Arizona Corp. Comm'n, 10 FCC Rcd 7824, 7833 (1995) ("regulatory parity is an important policy that can yield important pro-competitive and pro-consumer benefits"); Competition in the Interstate Interexchange Marketplace, 10 FCC Rcd 4562, 4653 (1995) (Separate Statement of Commissioner Rachelle B. Chong) ("[W]e must strive for . . . regulatory parity to the extent possible."); Luncheon Remarks by Commissioner James E. Quello Before the Washington Metropolitan Cable Club, 1995 FCC LEXIS 3696 at *7 (June 7, 1995) (urging "regulatory parity between multichannel video programming providers").

[12] See § 653(b)(1)(A), (E) (to be codified at 47 U.S.C. § 573(b)(1)(A), (E)).

another owner is the local cable operator. The MSO holding exclusive OVS rights could distribute CNN as a stand-alone channel or as part of a multi-channel offering (or it might not use the rights at all). The LEC, which could not obtain CNN for distribution over its own multichannel service, would be defanged as a threat to the incumbent cable operator.

Absent a clear Commission policy forbidding exclusive OVS programming contracts, LECs would open the door to such abuses if they decided to operate open video systems rather than cable systems. Merely by establishing open video systems, LECs would create a situation in which their video distribution affiliates could be denied the programming they "need in order to provide a viable and competitive multichannel alternative to the American public."[13] If the Commission does not adopt a per se rule against exclusive contracts, and instead leaves the issue to be resolved in case-by-case adjudications, LECs may find the risk unacceptable and close their systems to outsiders.

III. A Per Se Rule Is Consistent with the Commission's Treatment of DBS Programming Contracts.

The Commission determined in its Reconsideration Order not to adopt a per se rule that exclusive contracts between DBS operators and vertically integrated satellite cable programmers violate the 1992 Cable Act.[14] But the considerations underlying that decision are not present here.

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[13] First Report, 8 FCC Rcd at 3362.

[14] Reconsideration Order, 10 FCC Rcd at 3120-27.

In the Reconsideration Order, the Commission determined that Congress's "concern over cable operators' use of exclusivity to stifle competition from other technologies," was not implicated in the DBS context.[15] As explained above, though, there would be a serious possibility of abuses by cable operators in the OVS context.

The Commission also noted that forbidding DBS providers from entering into exclusive distribution contracts could result in inefficient carriage of the same signal on multiple transponders of the same satellite.[16] Congress anticipated this problem in the OVS provisions of the 1996 Act and directed the Commission to adopt channel-sharing rules that address it.[17]

Finally, the Commission suggested that a ban on exclusive contracts with DBS providers might discourage the development of DBS as an alternative to cable, and thus run counter to the purposes of the 1992 Cable Act.[18] Just the opposite is true for OVS. If exclusive contracts are allowed, LECs (which cannot benefit from them) will be less likely to deploy open video systems and more likely to deploy cable systems, contrary to the objectives of both the 1992 Cable Act and the 1996 Act.

Congress's introduction of the OVS concept thus provides ample basis for the Commission to distinguish its prior holding

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[15] Id. at 3123-24.

[16] Id. at 3126.

[17] § 653(b)(1)(C).

[18] Reconsideration Order, 10 FCC Rcd at 3125-27.

that per se treatment of exclusive contracts with DBS providers is inappropriate. Indeed, the Commission would be free to change course even if it had adopted a broad rule against addressing non-cable exclusive contracts on a per se basis.[19] Exclusive contracts for OVS distribution necessarily will inhibit the development of OVS in violation of section 628(b) and section 76.1001 of the Commission's rules.[20]

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[19]See Greater Boston Television Corp. v. FCC, 444 F.2d 841, 852 (D.C. Cir. 1970) (agency may depart from prior policies if provides a reasoned explanation), cert. denied, 403 U.S. 923 (1971).

[20]See Reconsideration Order, 10 FCC Rcd at 3127.